

No. 17-251

IN THE
Supreme Court of the United States

ABEL DANIEL HIDALGO,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Arizona

**BRIEF FOR AMNESTY INTERNATIONAL
AMICUS CURIAE SUPPORTING PETITIONER**

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INTEREST OF THE *AMICUS CURIAE*¹

Amnesty International is a global movement of more than seven million people who campaign for a world in which human rights are enjoyed by all. Amnesty International works independently and impartially to promote respect for human rights. The organization is independent of any government, political group, economic interest, or religion, and it is funded mainly by its members, as well as by public donations. Amnesty International monitors legal practices in countries throughout the world for compliance with international human rights law, and it works to end grave abuses of human rights and to demand justice for those whose rights have been violated.

Amnesty International believes that the death penalty violates the right to life, as protected under the Universal Declaration of Human Rights of 1948, and that it is the ultimate cruel, inhuman and degrading punishment.

Amnesty International opposes the death penalty in all cases without exception. For forty years, Amnesty International has been actively engaged in advocacy work to abolish capital punishment. During that time, there has been significant global progress toward ending capital punishment, as 105 countries have abol-

¹ Pursuant to Rule 37.2, Amnesty International states that both parties have consented to the filing of this brief. Amnesty International provided notice five days before this brief was filed. Despite the late notice, Respondent has suffered no prejudice (as reflected by its consent) because it has already received an extension of the time in which to file its response. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

ished the death penalty—up from just sixteen countries in 1977 when Amnesty International began its campaign. And more than two-thirds of all nations have ceased executions, either as a matter of law or practice, the latter meaning that they have not executed anyone during the past ten years and are believed to have a policy or established practice of not carrying out executions.

This Court should consider international law and the domestic practices of other nations in applying the Eighth Amendment’s prohibition against cruel and unusual punishment. In the face of evolving legal and moral norms in the international community, the United States has become a deep outlier. Amnesty International respectfully submits that the global movement toward abolition is highly “instructive” to this Court’s interpretation of the Eighth Amendment in light of the “evolving standards of decency that mark the progress of a maturing society.” *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

Amnesty International thus urges the Court to grant review of the question “whether the death penalty in and of itself violates the Eighth Amendment, in light of contemporary standards of decency.” Pet. i.

SUMMARY OF ARGUMENT

Under this Court’s precedent, the views of “other nations that share” the United States’ legal heritage help to inform what constitutes “cruel and unusual punishment” within the meaning of the Eighth Amendment. *See Roper*, 543 U.S. at 577. The Court has thus previously looked to international practice in striking down particular applications of the death penalty as unconstitutional. *See, e.g., id.* at 575-77 (execu-

tion of juvenile offenders); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (execution of people with intellectual disabilities). These decisions were important landmarks, which helped advance the cause of human dignity. But the United States remains badly out-of-step with the global community in a more fundamental way, as a handful of jurisdictions within the country continue to execute prisoners at a steady clip, even as peer countries have embraced abolition.

In the forty-one years since this Court last squarely addressed the constitutionality of the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976), eighty-nine countries have either abolished capital punishment or were founded without any provision for the death penalty in their laws. And multiple international treaties have been promulgated that require signatories to renounce the death penalty. Indeed, the European Union, one of the United States' closest allies, and the forty-seven member state Council of Europe, has made the abolition of capital punishment a condition of membership.²

By retaining the death penalty in the face of these international developments, the United States has become a significant outlier. Indeed, in 2016, it was the only nation in the Americas region to execute a prisoner. And, among countries where the data is available, the United States has regularly ranked among the top five nations reporting the highest numbers of execu-

² The United States was granted observer status at the Council of Europe in 1995. *But see* Parliamentary Assembly of the Council of Europe resolution 1253 (2001) (calling into question this observer status because of the United States' use of the death penalty).

tions, alongside countries such as Iran, Saudi Arabia, Iraq, and Pakistan.

The United States' continued use of death as a punishment for crime is contrary to human rights and an affront to personal dignity. It is time for the Court to reconsider whether the practice is categorically "cruel and unusual punishment," barred by the Eighth Amendment to the U.S. Constitution.

ARGUMENT

A. This Court Looks To The Practices Of The International Community To Inform Its Judgment Of Whether A Punishment Is "Cruel And Unusual" Under The Eighth Amendment.

This Court's Eighth Amendment jurisprudence has long recognized that determining whether a punishment is "cruel and unusual" requires an inherently moral judgment that should be guided by "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). "[T]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting)).

The Eighth Amendment was born as an international concept. The language of the amendment long predates the founding of the United States, flowing directly from the English Bill of Rights of 1689, 1 Wm. & Mary, 2d Sess. (1689), c. 2, and the Magna Carta before

it. *Trop*, 356 U.S. at 100. And, much like the body of international human rights law that those documents helped to inspire, the focus of the Eighth Amendment is “nothing less than the dignity of man.” *Id.* Thus, for over half a century the Court has properly sought guidance from the laws and practices of the “civilized nations of the world” in discerning how standards of decency have evolved. *See, e.g., Roper*, 543 U.S. at 575-78 (recognizing “the overwhelming weight of international opinion against the juvenile death penalty”); *Atkins*, 536 U.S. at 316 n.21 (“[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”); *see also Thompson v. Oklahoma*, 487 U.S. 815, 830 & n.31 (1988) (plurality opinion); *Enmund v. Florida*, 458 U.S. 782, 796-97 n.22 (1982); *Coker v. Georgia*, 433 U.S. 534, 596 n.10 (1977) (plurality opinion); *Trop*, 356 U.S. at 100-01.

These principles are directly relevant here, because, as discussed below, world opinion and international legal practice have shifted strongly against the death penalty as a legitimate form of criminal punishment.

B. The United States Is A Global Outlier In Continuing To Execute Prisoners As Punishment.

1. As global opinion and international legal practice have evolved, the United States now stands as one of the few nations in which the death penalty remains available as a punishment and is used with any regularity. *See* AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL GLOBAL REPORT, DEATH SENTENCES AND EXECUTIONS 2016 (2017) (“2016 Report”).

Amnesty International reports³ that only twenty-three countries⁴ carried out judicial executions in 2016. *Id.* at 4; *see also Glossip v. Gross*, 135 S. Ct. 2726, 2775 (2015) (Breyer J., dissenting) (noting that only twenty-two countries carried out executions in 2013, which supports the claim that capital punishment is “unusual”). The United States is ranked as having the seventh highest incidence of executions in that list of twenty-three countries. 2016 REPORT at 5. Typically, the United States has ranked even higher: the United States has been one of the world’s top-five annual executioners on all but two years since 1991. *Id.* at 4; *Death Sentences and Executions 2016*, Amnesty International USA (April 7, 2017), <https://www.amnestyusa.org/reports/death-sentences-executions-2016/>.

³ Amnesty International reports judicial executions based on data collected from a variety of sources, including official figures, other civil society organizations’ reports, and media reports. Amnesty International only reports the use of the death penalty where there is reasonable confirmation. As a result, there are significant gaps in the available data. For example, Belarus, China, and Vietnam classify data concerning their use of the death penalty as state secrets. 2016 REPORT at 2. Amnesty International is also unable to confirm whether judicial executions took place in 2016 in Libya, Syria, and Yemen, and only limited information is available for Laos, Malaysia, North Korea, and Singapore. *Id.* at 18.

⁴ Afghanistan (6), Bangladesh (10), Belarus (4+), Botswana (1), China (+), Egypt (44+), Indonesia (4), Iran (567+), Iraq (88+), Japan (3), Malaysia (9), Nigeria (3), North Korea (+), Pakistan (87+), Palestine (State of) (3: Hamas authorities, Gaza), Saudi Arabia (154+), Singapore (4), Somalia (14: Puntland 1, Somaliland 6, Federal Government of Somalia 7), South Sudan (+), Sudan (2), Taiwan (1), United States of America (20), Vietnam (+). 2016 REPORT at 5.

The United States is one of only eleven countries that have consistently conducted executions over the past five years. The other ten are Afghanistan, China, Iran, Iraq, Japan, North Korea, Saudi Arabia, Somalia, Sudan, and Taiwan. 2016 REPORT at 5. Iran, Iraq, Pakistan, and Saudi Arabia carried out 87% of the world's confirmed executions in 2016.⁵ *Id.* at 4; *see also Glossip*, 135 S. Ct. at 2775 (Breyer J., dissenting) (“[A]lmost 80% of all known executions took place in three countries: Iran, Iraq, and Saudi Arabia.”).

In 2016, for the eighth consecutive year, the United States was the *only* country to carry out executions in the Americas region. 2016 REPORT at 11-12; *see also Glossip*, 135 S. Ct. at 2775 (Breyer J., dissenting) (“[T]he United States was the only country in the Americas to execute an inmate in 2013”). A survey of other regions further illustrates how unusual the death penalty has become in much of the world.

- In Europe and Central Asia, Belarus was the only country that carried out executions in 2016. 2016 REPORT at 28. That rarity is unsurprising: in order for a country to receive admission to the European Union, it *must* renounce application of

⁵ In 2009 Amnesty International stopped publishing its estimated figures on the use of the death penalty in China. Amnesty International always made clear that the figures it was able to publish on China were significantly lower than the reality, because of the restrictions on access to information. Amnesty International's decision to stop publishing data reflected concerns about how the Chinese authorities misrepresented Amnesty International's numbers. Available information indicates that thousands of people are executed and sentenced to death in China each year. 2016 REPORT at 2.

the death penalty. *See* Treaty of Lisbon, Article 6 (Dec. 1, 2009).

- In the Middle East and North Africa, executions were confirmed in five countries in 2016: Egypt, Iran, Iraq, Palestine, and Saudi Arabia.⁶ 2016 REPORT at 30-31. Israel has not carried out an execution since 1962. *See* Amnesty Int'l, *Abolitionist and Retentions Countries as of July 2017*, AI Index No. ACT 50/6665/2017 (2017), available at <https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf> ("AI Index").
- In the Asia Pacific, executions are known to have been carried out in eleven countries in 2016: Afghanistan, Bangladesh, China, Indonesia, Japan, Malaysia, North Korea, Pakistan, Singapore, Taiwan, and Vietnam. 2016 REPORT at 17-18.
- In Sub-Saharan Africa, judicial executions were carried out in five countries in 2016: Botswana, Nigeria, Somalia, South Sudan, and Sudan. *Id.* at 35-36.

All told, only 11% of the 193 member states of the United Nations carried out recorded executions in 2016. *Id.* at 8. And among "Group of 8" countries, Japan was the only nation other than the United States to perform an execution in 2016. *Id.*⁷

⁶ Amnesty International was unable to confirm whether judicial executions took place in Libya, Syria, and Yemen. 2016 REPORT at 4.

⁷ As noted, p. 5, *supra*, it is widely suspected that some additional countries regularly carry out executions. *See* 2016 REPORT at 2, 4.

These low execution rates reflect the fact that, even among nations that formally authorize the death penalty, there is a growing reluctance to actually execute prisoners. *Cf. Graham v. Florida*, 560 U.S. 48, 62 (2010) (recognizing that “actual” penal practices must be scrutinized when determining if there is a consensus against a punishment practice, regardless of what punishments are formally authorized). Amnesty International confirmed that while 3,117 people received a death sentence in fifty-five countries in 2016, only one third of that number (1,032 people) were actually executed in just under half as many countries (23). 2016 REPORT at 4, 5.

2. The unusual nature of the United States’ position appears in particularly stark relief when compared to countries that share its legal heritage in other respects. This Court has repeatedly recognized that the views held by “other nations that share” the United States’ “Anglo-American heritage” are of particular relevance to its analysis of the Eighth Amendment’s application. *Thompson*, 487 U.S. at 830 & n.31 (Stevens, J., concurring). And the Court has emphasized that “[t]he United Kingdom’s experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins.” *Roper*, 543 U.S. at 577.

In approximately 150 years, the United Kingdom has evolved from a nation in which individuals could face a sentence of death for hundreds of seemingly arbitrary offenses including forgery, poaching, the cut-

But these countries have kept their use of the death penalty a secret—which itself highlights the international community’s disapproval of the practice.

ting of fruit bearing trees, or even being caught out at night with a blackened face,⁸ to one that abolished the death penalty for murder in 1965. Murder (Abolition of Death Penalty) Act of 1965, c. 71, § 1(1) (Eng.); *see also* Julian B. Knowles Q.C., *THE ABOLITION OF THE DEATH PENALTY IN THE UNITED KINGDOM, HOW IT HAPPENED AND WHY IT STILL MATTERS* 9-56 (2015) (“Knowles”). Dissatisfaction and embarrassment with the so-called “Bloody Code” of the seventeenth and eighteenth centuries contributed to a continuing campaign to limit or abolish the death penalty.⁹

No person has been executed for any offense in the United Kingdom since 1964. *See* KNOWLES at 5; Frederick C. Millett, *Will the United States Follow England (and the Rest of the World) in Abandoning Capital Punishment?*, 6 *PIERCE L. REV.* 547, 580-81 (2008) (“Millett”). While the death penalty technically remained available for a few more decades for certain high crimes against the state,¹⁰ the last execution for any

⁸ *See, e.g.*, The Black Act 1723 (9 Geo 1, c. 22); *see also* WILF, S., *LAW’S IMAGINED REPUBLIC: POPULAR POLITICS AND CRIMINAL JUSTICE IN REVOLUTIONARY AMERICA* 139 (Cambridge University Press 2010).

⁹ *See* Offences Against the Person Act of 1861, 24 & 25 Vict., c. 100, § 1 (Eng.) (prohibiting capital punishment for all crimes save murder or specific high crimes against the state); the Children Act of 1908, 8 Edw. 7, c. 67 (Eng.), and the Children and Young Persons Act of 1933, 23 Geo. 5, c. 12 (Eng.) (abolishing capital punishment for juveniles under sixteen and eighteen years of age, respectively); the Homicide Act of 1957, 5 & 6 Eliz. 2, c. 11 (Eng.) (limiting the types of capital murder as well as establishing the concept of “diminished responsibility”).

¹⁰ The remaining capital offenses were causing a fire or explosion in a naval dockyard, ship, magazine or warehouse (Abolished via Criminal Damage Act, 1971, c. 48, § 4(1)-(2) (Eng.)); espionage (Abolished via Armed Forces Act, 1981, c. 55 § 17 (Eng.)); and pi-

such crimes against the crown took place in 1946. KNOWLES at 5 n.2. By 1998, no crimes were punishable by the death penalty within the United Kingdom, and the United Kingdom ratified Protocol No. 13 to the European Convention on Human Rights in 2003, affirmatively prohibiting the death penalty in all circumstances. *Id.*; see Human Rights Act 1998 (Amendment), Order 2004 (SI 2004/1574).

The United Kingdom's rejection of the death penalty has largely been mirrored by the former British Commonwealth. The death penalty has been officially abolished in Australia, New Zealand, Canada, South Africa, Malta, Mauritius, and Mozambique, as well as in several island nations and the Crown Dependencies. KNOWLES at 61-63, *see also* 2016 REPORT at 42. Further, as the Privy Council of the United Kingdom acts as a court of last appeal for various British overseas territories and many otherwise independent Commonwealth nations, KNOWLES at 61-62, the scope and prevalence of the death penalty has been greatly limited even in those Commonwealth nations that retain it. The Judicial Committee of the United Kingdom Privy Council has, for instance, regularly rejected the application of the death penalty because such application would qualify as "cruel and usual punishment." *See, e.g., Reyes v The Queen* [2002] AC 235 (Belize); *Hughes v The Queen* [2002] 2 AC 259 (St Lucia); *Fox v The Queen* [2002] 2 AC 284 (St. Christopher and Nevis); *Watson v The Queen* [2005] 1 AC 472 (Jamaica); *Bowe v The Queen* [2006] 1 WLR 1623 (The Bahamas). Since

racy with violence, high treason and certain purely military offences (All abolished via Crime and Disorder Act, 1998, c. 37, § 36(4)-(5) (Eng.)).

2000, only nine out of fifty-two Commonwealth Nations have carried out an execution.¹¹

As of today, fifty-six countries that have repealed the death penalty for all crimes have also enshrined its abolition in their Constitutions.¹² A further nineteen have included an explicit reference to the right to life.¹³

C. The Global Community Has Moved Dramatically Toward Abolition Over The Last Forty Years.

Not only is the small number of countries that engage in executions for criminal offenses significant, but so too is the “rate of change” that has taken place in the world. *Roper*, 543 U.S. at 565-66; *see also Atkins*, 536 U.S. at 315 (giving weight to the “consistency of the direction of change” against executing people with intellectual disabilities). In the forty years since this Court last squarely addressed a direct challenge to the constitutionality of capital punishment in all cases, *see*

¹¹ Specifically: Bangladesh, Botswana, Gambia, India, Malaysia, Nigeria, Pakistan, Singapore, and Uganda. *See* AI Index.

¹² Andorra, Angola, Armenia, Austria, Belgium, Bolivia, Cambodia, Cape Verde, Colombia, Congo (Republic of), Côte d’Ivoire, Croatia, Djibouti, Dominican Republic, Ecuador, Finland, France, Georgia, Germany, Guinea-Bissau, Haiti, Honduras, Iceland, Ireland, Italy, Kyrgyzstan, Luxembourg, Macedonia, Marshall Islands, Mexico, Micronesia, Moldova, Monaco, Montenegro, Mozambique, Namibia, Nepal, Netherlands, Nicaragua, Norway, Panama, Paraguay, Portugal, Romania, Sao Tomé and Príncipe, Serbia, Seychelles, Slovakia, Slovenia, Sweden, Switzerland, Timor-Leste, Turkmenistan, Turkey, Uruguay, and Venezuela.

¹³ Albania, Bosnia-Herzegovina, Bulgaria, Burundi, Costa Rica, Hungary, Latvia, Liechtenstein, Lithuania, Poland, Rwanda, Senegal, Solomon Islands, South Africa, Suriname, Togo, Ukraine, Uzbekistan, and Vanuatu.

Gregg, 428 U.S. at 153, the international community has engaged in a sustained campaign to curtail the use of the death penalty.

1. The first country to categorically abolish the death penalty did so in 1863. *See* AI Index. In the 112 years between that move and this Court's decision in *Gregg* (*i.e.*, from 1863-1975), only sixteen countries joined in abolishing capital punishment in all circumstances. *See id.* at 5-9. But in the forty-one years since *Gregg* (*i.e.*, from 1976-2017), *eighty-nine more*¹⁴ countries have abolished the practice outright. *See id.* Sixty-seven countries abolished capital punishment in the 1990s and 2000s, and an additional six have abolished the death penalty in just 2015 and 2016. *See id.*

In addition, a number of countries have taken steps to substantially curtail the death penalty in that time period. For example, between 1976 and 2017, twenty countries limited the death penalty to exceptional crimes, such as crimes under military law or crimes committed in exceptional circumstances. *See id.* In contrast, only fifteen countries took similar narrowing steps from 1863 to 1975. *See id.*

Taken together, these statistics (summarized in the following table and in the graph in the Appendix at App. 1) demonstrate that, since *Gregg* in 1976, the international community has moved steadily toward a consensus against the use of capital punishment.

¹⁴ Several of these countries excluded the death penalty from their domestic laws upon gaining independence.

	Total Abolition	Abolition for Ordinary Crimes
1863-1975	16 countries	15 countries
1976-2017	89 countries	20 countries

Of course, there have been holdouts. But in several instances, countries that have retained capital punishment have rejected other basic international laws and customs, making them a poor guide for assessing “standards of decency that mark the progress of a maturing society.” *Roper*, 543 U.S. at 561 (quoting *Trop*, 356 U.S. at 100-01). For example, in 2016, Bahrain, China, Iran, Iraq, North Korea, and Saudi Arabia each convicted and executed individuals “based on ‘confessions’ that may have been extracted through torture or other ill-treatment.” 2016 REPORT at 7.

2. The shift in the international community’s treatment of the death penalty is reflected in a series of international treaties and international agreements adopted to abolish or at least dramatically limit capital punishment. These agreements have sought to narrow the acceptable uses of the death penalty over time, and have culminated in agreements recognizing that executions are never a legally or morally appropriate form of punishment.

Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1983).¹⁵

Protocol No. 6, signed by all forty-seven Member States of the Council of Europe¹⁶ and ratified by every Member (other than Russia), abolishes the death penalty entirely for crimes during peacetime. The Protocol responded directly to concerns that Article 2 of the European Convention on Human Rights did not “adequately reflect the situation actually attained in regard to the death penalty in Europe” and a recommendation from the European Ministers for Justice that “the Committee of Ministers . . . study the possibilities for the elaboration of new and appropriate European standards concerning the abolition of the death penalty.” Protocol No. 6, Explanatory Report at 1-2.

¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, Protocol No. 6, *opened for signature* Apr. 28, 1983, E.T.S. 114 (“Protocol No. 6”).

¹⁶ Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and United Kingdom.

*The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (1989).*¹⁷

This side agreement to the International Covenant on Civil and Political Rights provides for the total abolition of the death penalty in peacetime. Eighty-four nations,¹⁸ including every Western European country and Canada, have ratified this agreement, expressing a belief “that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights.” Second Optional Protocol, Preamble ¶ 1.

¹⁷ G.A. Res. 44/128, U.N. Doc. A/RES/44/128 (Dec. 15, 1989) (“Second Optional Protocol”).

¹⁸ Albania, Andorra, Argentina, Australia, Austria, Azerbaijan, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Cape Verde, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Honduras, Hungary, Iceland, Ireland, Italy, Kyrgyzstan, Latvia, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Mexico, Moldova, Monaco, Mongolia, Montenegro, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Philippines, Poland, Portugal, Romania, Rwanda, San Marino, Sao Tomé and Príncipe, Serbia, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Timor-Leste, Togo, Turkey, Turkmenistan, Ukraine, United Kingdom, Uruguay, Uzbekistan, and Venezuela. An additional two states (Angola and Madagascar) have signed, but not yet ratified, the agreement.

*The Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990).*¹⁹

This Protocol, adopted by the General Assembly of the Organization of American States (“OAS”),²⁰ also provides for the total abolition of the death penalty in peacetime. Thirteen OAS nations have ratified the Protocol,²¹ reflecting a growing consensus in the Americas “[t]hat everyone has the inalienable right to respect for his life, a right that cannot be suspended for any reason; [t]hat the tendency among the American States is to be in favor of abolition of the death penalty,” and “[t]hat the abolition of the death penalty helps to ensure more effective protection of the right to life.” OAS Protocol, Preamble ¶¶ 2-5.

¹⁹ Protocol to the American Convention on Human Rights to Abolish the Death Penalty, *opened for signature* June 8, 1990, O.A.S.T.S. 73 (“OAS Protocol”).

²⁰ OAS is a regional organization comprised of representatives from the 35 independent states of the Americas and constitutes the main political, juridical, and social governmental forum in the Hemisphere. *OAS: Who We Are*, Organization of American States (2017), http://www.oas.org/en/about/who_we_are.asp (last visited Sept. 12, 2017).

²¹ Argentina, Brazil, Chile, Costa Rica, Dominican Republic, Ecuador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay, and Venezuela.

*Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances.*²²

As its name suggests, Protocol No. 13 provides for the abolition of the death penalty in all circumstances, including times of war. Every Member of the Council of Europe has signed Protocol No. 13, other than Azerbaijan and Russia, and forty-four of the forty-seven Members have ratified the agreement.²³ The accompanying explanatory report notes that, beginning with Protocol No. 6 in 1983, “there has been an evolution in domestic and international law towards abolition of the death penalty.” Protocol No. 13, Explanatory Report at 1-3. In addition, Protocol No. 13 itself asserts a conviction by its signatories “that everyone’s right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings.” Protocol No. 13, Preamble ¶ 1.

²² Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the death penalty in all circumstances, Protocol No. 13, *opened for signature* May 3, 2002, 2246 U.N.T.S. 110, E.T.S. 187, (“Protocol No. 13”).

²³ Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and United Kingdom. One additional state (Armenia) has signed, but not ratified the agreement.

3. Another relevant indicator in the decades since this Court last directly considered the constitutionality of the death penalty in *Gregg*, is that this punishment has not been authorized under the statutes of international tribunals such as the International Tribunal for the Former Yugoslavia,²⁴ the International Tribunal for Rwanda,²⁵ or the International Criminal Court,²⁶ even though each was established to prosecute the most serious crimes, including genocide, war crimes, and crimes against humanity. Furthermore, in repeated resolutions adopted at the United Nations General Assembly during the past decade, a clear majority of countries has voted in favor of calls for the establishment of a moratorium on executions with a view to abolishing the death penalty, in the name of deepening respect for human dignity and contributing to the enhancement and progressive development of human rights.²⁷

²⁴ Available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

²⁵ Available at http://legal.un.org/avl/pdf/ha/ictr_EF.pdf.

²⁶ Available at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

²⁷ G.A. Res. 62/149, U.N. GAOR, 62d Sess., U.N. Doc. A/RES/62/149 (Dec. 18, 2007); G.A. Res. 63/168, U.N. GAOR, 63d Sess., U.N. Doc. A/RES/63/168 (Dec. 18, 2008); G.A. Res. 65/206, U.N. GAOR, 65th Sess., U.N. Doc. A/RES/65/206 (Dec. 21, 2010); G.A. Res. 67/176, U.N. GAOR, 67th Sess., U.N. Doc. A/RES/67/176 (Dec. 20, 2012); G.A. Res. 69/187, U.N. GAOR, 69th Sess., U.N. Doc. A/RES/69/187 (Dec. 18, 2014); G.A. Res. 71/187, U.N. GAOR, 71st Sess., U.N. Doc. A/RES/71/187 (Dec. 19, 2016).

* * * * *

Moral condemnation for the death penalty has expanded dramatically in the years since *Gregg*, leaving the United States as an outlier that is deeply at odds with international legal opinion. Particularly in light of these global trends, the time has come for the Court to reconsider whether capital punishment is consistent with evolving standards of decency under the Eighth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

